No. 05-36210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CYNTHIA CORRIE and CRAIG CORRIE, *et al.*
Plaintiffs-Appellants,

v.

CATERPILLAR INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States hereby submits this brief in support of affirmance of the district court's judgment of dismissal.

1. Plaintiffs here are seeking to hold defendant liable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for selling bulldozers to the State of Israel, and also seek to enjoin any further sales. The district court properly refused to employ its common law powers to create aiding-and-abetting liability for these ATS claims. The court recognized that, under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), in

deciding whether to adopt a rule of aiding-and-abetting liability under the ATS, it was required to consider the potential foreign policy consequences of such a ruling.

The United States has a very substantial interest in the proper construction and application of the ATS. If improperly construed or applied, the ATS could impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727. Furthermore, the United States is uniquely positioned to address the foreign policy consequences that may follow from a ruling recognizing aiding-and-abetting liability for ATS claims in general and in the present case.

Moreover, funds requested by the Executive and appropriated by Congress were used by Israel to purchase the equipment in question under the Foreign Military Financing ("FMF") Program. Nonetheless, plaintiffs would have a court limit the use of those funds, by prohibiting the sale of the equipment to Israel and holding the U.S. manufacturer liable for the past sales. The United States has a strong interest in ensuring that it speaks with one voice on matters of foreign policy and that a court not interfere unduly with the FMF program, a critical element in the conduct of U.S foreign relations. As the district court correctly observed, for a court "to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government." Excerpts of Record ("ER") Doc. 62 at 16.

While supporting dismissal of the claims based on legal and foreign policy concerns, the United States wishes to state its deep regrets for the tragic death of Rachael Corrie as well as any other civilian deaths, injuries and losses resulting from the practice of demolitions. In addressing the legal issues in this case as amicus curiae, the United States makes no judgment on the underlying conduct and wishes to make clear that the decision not to address other legal doctrines or issues or the underlying conduct should not be understood to indicate any view regarding those matters.

2. The district court's dismissal of plaintiffs' ATS claims should be affirmed. The *Sosa* Court rejected the notion that the ATS grants federal courts unencumbered common law powers to recognize and remedy asserted international law violations. The Court went out of its way to chronicle reasons why a court must act cautiously and with "a restrained conception of the discretion" in both recognizing ATS claims and in extending liability. *Sosa*, 542 U.S. at 725-730, 732 n.20. The Court discussed at length the reasons for approaching this federal common law power with "great caution," *id.* at 727-728. As we detail below, all of the admonitions articulated by the *Sosa* Court apply with full force to the aiding-and-abetting claims in this case and, accordingly, the district court properly rejected plaintiffs' claims.

Furthermore, the Supreme Court has instructed that whether or not to permit a civil aiding-and-abetting claim is properly a legislative choice. *See Central Bank*

of Denver v First Interstate Bank, 511 U.S. 164 (1994). Accordingly, absent a clear direction from Congress, a federal court should not recognize such claims under the ATS.

In addition, civil aiding-and-abetting liability does not, in any event, satisfy *Sosa's* threshold requirement that an international law norm be both firmly established and well defined before it can form the basis for claim brought under the ATS.

3. This Court should reject plaintiffs' contention that they can assert federal common law claims for alleged human rights violations under a court's general federal question jurisdiction. As we explain below, the limited common law authority recognized in *Sosa* flowed directly from the enactment of the ATS and is limited to claims asserted under that provision.

4. The district court correctly held that the Torture Victim Protection Act ("TVPA"), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (note)), does not provide for aiding-and-abetting liability here. As the district court held, "an aiding and abetting claim is inconsistent with the TVPA's explicit requirement that a defendant must have acted under 'color of law.'" ER Doc. 62 at 8.

5. Finally, the district court also correctly held that foreign policy concerns support dismissal of the claims. The extent to which the use of the FMF funding to Israel or any other foreign state is to be limited or restricted based on the allegations

asserted by plaintiffs is a matter for the Executive Branch and Congress, not the courts.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT ALLEGATIONS OF AIDING AND ABETTING ARE NOT ACTIONABLE UNDER THE ATS.

A. The Court Should Be Very Hesitant To Apply Its Federal Common Law Powers To Resolve A Claim Centering On The Treatment of Foreign Nationals By A Foreign Government Outside The United States.

Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law -- *i.e.*, the law of the United States. The question, thus, becomes whether the challenged conduct should be subject to a cause of action under -- and thus governed by -- *U.S. law*. In this case, the aiding-and-abetting claims asserted against defendant turn upon the alleged misconduct by the Israeli military against individuals living in the Gaza Strip and the West Bank. It would be extraordinary to give U.S. law an extraterritorial effect in such circumstances to regulate conduct of a foreign state in foreign territories, and all the more so for a federal court to do so as a matter of common law-making power.

When construing a federal statute, there is a strong presumption against projecting U.S. law to resolve disputes that arise in foreign territories. *See EEOC v*

Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Ibid.* Notably, the same strong presumption existed in the early years of this Nation, and, significantly, even the federal statute that defined and punished as a matter of U.S. law one of the principal law of nations offenses -- piracy -- was held not to apply where a foreign state had jurisdiction. *See United States v. Palmer*, 16 U.S. 610, 630-631 (1818) (the federal piracy statute should not be read to apply to foreign nationals on a foreign ship). *See also The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807).

In *Sarei v. Rio Tinto*, No. 02-56390, 2006 WL 2242146 at *42 n.5 (9th Cir. Aug. 7, 2006), this Court recently cited Attorney General Bradford's opinion from 1795 regarding the ATS That opinion noted the possibility of ATS jurisdiction for offenses on the high seas, but also explained that, insofar "as the transactions complained of originated or took place in a foreign country, *they are not within the cognizance of our courts*." *See* 1 Op. Att'y Gen. 57, 58 (1795) (emphasis added).

While the *Sosa* Court concluded that Congress, through the ATS, intended the federal courts to have a limited federal common law power to adjudicate well-established and defined international law claims, the Court went out of its way to chronicle reasons why a court must act cautiously and with "a restrained conception

of the discretion" in both recognizing ATS claims and in extending liability. *Sosa*, 542 U.S. at 725-730, 732 n.20. The Court instructed the federal courts to refrain from an "aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Id* at 726. Notably, the Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 727-728. Indeed, given the accepted principles of the time, it is highly unlikely that the drafters of the ATS intended to grant the newly created federal courts unchecked power to apply their federal common law powers to decide extraterritorial disputes regarding a foreign nation's actions taken abroad against non-U.S. citizens. Nothing in the ATS, or in its contemporary history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the assaults on ambassadors that preceded and motivated the enactment of the ATS involved conduct purely within the United States. *See id.* at 720, 724.

Against this backdrop, reinforced by caution recently mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law powers to resolve claims, such as the ones here, centering on the asserted mistreatment of foreign residents by a foreign government outside the United States.[1]

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[1] While this Court recently permitted an ATS claim to proceed in a case (continued...)

The fact that plaintiffs have sued a U.S. corporate defendant does not alter these concerns. The truth remains that these claims turn upon the alleged acts of the State of Israel taken in Gaza and the West Bank, and would require a U.S. court to pass judgment on the propriety of those acts.

B. The Significant Policy Decision To Impose Aiding-And-Abetting Liability For ATS Claims Should Be Made By Congress, Not The Courts.

As the Supreme Court has held, the creation of civil aiding-and-abetting liability is a legislative act that the courts should not undertake without Congressional direction, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.

1. The Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank*, 511 U.S 164 (1994), is key to this case; there, the Court explained that there is no "general presumption" that a federal statute should be read to extend aiding-and-abetting liability to the civil context. In the criminal law context "aiding and abetting

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[1](...continued)
involving claims of residents of a foreign country regarding acts that took place in that country, *see Sarei v. Rio Tinto*, *supra*, the United States did not participate in the litigation before this Court, and the private parties there did *not* argue and this Court did *not* address whether, in light of the presumption against extraterritoriality, the ATS should be construed to apply to mistreatment of foreign residents by a foreign government. Accordingly, the Court's decision should not be read as having considered or as having resolved the issue.

is an ancient * * * doctrine," *id.* at 181, but its extension to permit civil redress is not well established and has "at best uncertain in application." *Ibid.* While in the criminal context the government's prosecutorial judgment serves as a substantial check on the imposition of criminal aiding-and-abetting liability, there is no similar check on civil aiding-and-abetting liability claims. *Cf. Sosa*, 542 U.S. at 727.

Significantly, the *Central Bank* Court noted that "Congress has not enacted a general civil aiding and abetting statute – either for suits by the Government * * * or for suits by private parties." 511 U.S. at 182. The Court concluded, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, *there is no general presumption that the plaintiff may also sue aiders and abettors.*" *Ibid.* (emphasis added).[2] Thus, under *Central Bank*, a court must not presume that there is any right to assert an aiding-and-abetting claim under the ATS.

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[2] The presumption against implying aiding-and-abetting liability can be overcome in our domestic law. For example, the United States successfully argued in favor of aiding-and-abetting liability under a statute providing a cause of action for those injured by an act of international terrorism, 18 U.S.C. § 2333. *See Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002). That argument was based, however, on that statute's particular context, language, and purposes. The court made clear that a different result would attach in the absence of an express cause of action, as is true here. To adopt aiding-and-abetting liability in that context would be to improperly "pile inference upon inference." *Id.* at 1019.

Moreover, in *Central Bank*, the Court explained that adoption of aiding-and-abetting liability for civil claims would be "a vast expansion of federal law." 511 U.S. at 183. Such an expansion of the law, the Court held, required legislative action, and could not be carried out through the exercise of federal common law. *Ibid.* So, too, under the ATS. Reading this statute to permit aiding-and-abetting claim would vastly increase its scope and range. That vast increase should not be undertaken without clear guidance from Congress. Notably, the Supreme Court described the ATS as an "implicit sanction to entertain the *handful* of international law *cum* common law claims." *Sosa*, 542 U.S. at 712 (emphasis added).

In the ATS context, the *Sosa* Court explicitly cautioned that federal courts should be wary of "exercising innovative authority over substantive law" without "legislative guidance." *Sosa*, 542 U.S. at 712, 726. Imposing private liability not only on those persons who violate a narrow set of international-law norms, but also on any persons who aid and assist the primary wrongdoer, would constitute a vast expansion of the scope of liability.

The *Sosa* Court also warned against the courts assuming a legislative function in "craft[ing] remedies" where resolution of the legal issues could adversely implicate foreign policy and foreign relations. 542 U.S. at 727-728. The caution mandated by *Sosa* in deciding whether to recognize and enforce an international law norm under the ATS, when coupled with the teaching of *Central Bank* that the decision whether

to adopt aiding-and-abetting liability for a civil claim is a legislative policy judgment, leads to the unmistakable conclusion that aiding-and-abetting liability should not be recognized under the ATS, absent further Congressional action.

2 The issue of whether aiding-and-abetting liability should be permitted under the ATS was not briefed to this Court in *Sarei v. Rio Tinto*, 2006 WL 2242146, *supra*, and not decided by the Court. There, the claims were *not* ones of aiding and abetting. Rather, plaintiffs there asserted that Papua New Guinea ("PNG") allegedly "committed atrocious human rights abuses and war crimes at the behest of Rio Tinto," an international mining corporation. *Id* 2006 WL 2242146 at *5. Plaintiffs there alleged that, "Rio Tinto knew that its wishes were taken as commands by the PNG government and Rio [Tinto] intended that its comments would spur the PNG forces into action," and that "Rio Tinto officials exercised control over the behavior of PNG forces with regard to the conflict around the mine." *Ibid.* In this context, this Court held that the actions of the military were "fairly attributable" to Rio Tinto, which, accordingly, could be subject to "vicarious liability" under the ATS. *Ibid.*

As this Court has long recognized, "vicarious" liability and aiding-and-abetting liability are not the same. *See State Farm Fire and Cas. Co. v. Bomke*, 849 F.2d 1218, 1220 (9th Cir. 1988). In the criminal context, the Supreme Court has explained the distinction between vicarious conspiracy liability and aiding-and-abetting liability *See Nye & Nissen v United States*, 336 U.S. 613, 620 (1949). Vicarious

conspirator liability is a "rule which holds responsible one who counsels, procures, or commands another to commit a crime." *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). In contrast, "[a]iding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy* * *. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing." *Nye*, 336 U.S. at 620.

Thus, to say there can be vicarious liability in the case of *Sarei*, where the defendant is alleged to have controlled the military and where the acts were alleged to have been taken at the defendant's behest, is not the same as saying that aiding-and-abetting liability is available under the ATS generally, or here where the claim is based on the mere sale of military equipment with alleged knowledge of how it would be used. Given the cautions mandated by *Sosa* and the analysis dictated by *Central Bank*, this Court should reject such claims.[3]

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[3] Attorney General Bradford's 1795 opinion, cited in *Sarei*, 2006 WL 2242146 at *42 n.5, does not support the conclusion that the ATS imposes aiding-and-abetting liability. That opinion involved the question whether American citizens who breached the United States' neutrality in the war between England and France by "join[ing], conduct[ing], aid[ing], and abett[ing] a French fleet in attacking" a British settlement on the coast of Africa, and "plundering or destroying the property" of the British settlers were subject to *criminal* prosecution in a U.S. court. 1 Op. Atty. Gen. 57, 58. Although the Attorney General opined that an injured person might "have a remedy by a civil suit in the courts of the United States" under the ATS, *id* at 58-59,
(continued...)

C. Practical Consequences For U.S. Foreign Relations Counsel Against The Adoption Of Aiding-And-Abetting Liability Under The ATS.

In *Sosa*, the Supreme Court warned that a court's limited federal common-law authority to recognize causes of action under the ATS must be exercised with "great caution" and "war[iness]," particularly where the exercise of common-law authority could impinge upon the political branches' discretion "in managing foreign affairs." *Id.* at 724-725, 727. A court deciding whether to adopt a federal common law rule extending aiding-and-abetting liability under the ATS must also consider the potential practical consequences, including the foreign policy effects of such a ruling. *See id.* at 732-733 ("the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"); *id* at 733 n.21 (in discussing other possible limiting principles, the Court stated, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). As this case amply demonstrates, adoption of a common law rule permitting aiding-and-abetting liability under the ATS would interfere with the U.S. Government's ability

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[3](...continued)
he did not address the substantive basis for any civil claims against the defendants — who had themselves committed unlawful conduct — much less endorse aiding-and-abetting liability.

to employ the full range of foreign policy options when interacting with various foreign governments. Those consequences strongly counsel against the judicial creation of aiding-and-abetting liability for ATS claims in this case or as a general rule.

Adoption of a common law rule permitting aiding-and-abetting liability under the ATS would interfere with the U.S. Government's ability to employ the full range of foreign policy options when interacting with various foreign governments.

1. Adopting aiding-and-abetting ATS liability in this case and permitting the claims to proceed would be improper because it would impose liability for the purchase of equipment funded by Congress in the exercise of its foreign policy prerogatives. Here, Israel's purchase of the equipment at issue was funded by the United States Government through the Department of Defense's Foreign Military Financing ("FMF") Program. This program, authorized by the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751-2799, allows the use of funds appropriated by Congress to finance the "procurement of defense articles, defense services, and design and construction services by friendly foreign countries and international organizations." 22 U.S.C. § 2763.[4] The United States made a foreign policy

[4] Foreign military financing is provided by the President "on such terms and conditions as he may determine" 22 U.S.C. § 2763, and under the Secretary of State's supervision and general direction "to the end that the foreign policy of the United (continued...)

determination to extend FMF aid to Israel and to encourage equipment manufacturers like Caterpillar to sell its goods to foreign states receiving such FMF funds.

The political branches have decided that strategic interests of the United States are furthered by funding purchases of defense equipment from U.S. suppliers by Israel and other participating states. The threat of suits against those suppliers based upon the purchasing country's use of that equipment would pose a significant disincentive to suppliers' participation in FMF sales. This would undoubtedly deter future suppliers from making sales to foreign governments that the political branches have determined our Nation should support in that fashion. Adoption of aiding-and-abetting liability in circumstances such as these could be seen as imposing a legal obligation on manufacturers to conduct an independent evaluation of the buyer's intended use for the product. Not only would meeting such an obligation be largely outside the competence of most participating suppliers, but it could increase the cost to manufacturers of participating in FMF sales, or discourage participation altogether, thereby increasing the cost to the U.S. Government of the FMF program and

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[4](...continued)
States would be best served thereby," 22 U.S.C. § 2752. Statutory provisions applicable to the provision of such foreign assistance include restrictions in the AECA and the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act ("FOAA"). *See, e.g* , 22 U.S.C. §§ 2799aa (nuclear enrichment transfers), 2799aa-1 (nuclear reprocessing transfers); 2005 FOAA (Pub. L. 109-102) §§ 508 (military coup), 542 (lethal military equipment transfer to terrorist states), 551 (gross violations of human rights), 581 and 583 (refusal to extradite).

jeopardizing its effectiveness. Thus, permitting an aiding-and-abetting claim for a U.S. supplier's participation in the FMF program would impermissibly undermine the foreign policy determinations of the political branches.

As noted above, the *Sosa* Court warned against exercising the common law power in a way that could impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. Here, the district court correctly observed that, for a court "to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government." ER Doc. 62 at 16.

2. This case is not unique. The adoption of an aiding-and-abetting rule here would in numerous other circumstances also implicate and limit the United States' foreign policy prerogatives. One important policy option for dealing with a foreign country is to promote active economic engagement in that country as a method of encouraging reform and gaining leverage with that country. The determination whether to pursue such a policy is the type of foreign affairs question constitutionally vested in the Executive Branch. *See Crosby v. NFTC*, 530 U.S. 363, 384-386 (2000); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936).

In the case of China, for example, economic engagement has been viewed as a potential means to advance human rights over the long term and to serve important U.S. interests by discouraging "disruptive action" and fostering public pressure for

"greater political pluralism and democracy." Congressional Research Service, *Issue Brief for Congress. China-U.S. Relations* 13 (Jan. 31, 2003). In South Africa in the 1980s, the United States employed both economic engagement and limited sanctions to encourage the South Africa government to end apartheid. *See* Pub. L. No. 99-440, §§ 4, 101; National Security Decision Directive 187 (1985).

Judicial imposition of aiding-and-abetting liability under Section 1350 would undermine the Executive's ability to employ economic engagement as an effective tool for foreign policy. Indeed, claims are currently pending before the Second Circuit seeking to impose civil liability on private companies that did business in apartheid-era South Africa during the period of the United States' policy of economic engagement. *See In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), appeal pending, No. 05-2141 (2d Cir.). There, the district court cogently explained, "[in] a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce." *Id.* at 554. The court, recognizing that it must be "mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding-and-

abetting of violations of international norms across the globe," refused to create such liability under the ATS. *See id.* at 551. The court properly reasoned that to adopt such a rule "would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court has mandated for the lower federal courts." *Id.* at 554.

Adopting aiding-and-abetting liability under Section 1350 would also spur more lawsuits, resulting in greater diplomatic friction. Aiding and abetting could be the basis for a wide range of claims that, although brought against third-party corporations, nonetheless sought to challenge the lawfulness of a foreign government's conduct — which is typically immune from direct challenge under the Foreign Sovereign Immunities Act, *see* 28 U S.C. §§ 1604, 1605(a)(5). Experience has shown that such suits often trigger foreign government protests, both from the nations where the alleged abuses occurred and, in some instances, from the nations where the corporations are based. Serious diplomatic friction can lead to a lack of cooperation with the United States Government on important foreign policy objectives. "To allow for expanded liability, without congressional mandate, in an area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of [a] Court's duty to engage in 'vigilant doorkeeping.'" *In re: South African Apartheid Litig.*, 346 F. Supp. 2d at 550 (quoting *Sosa*, 542 U.S. at 729).

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Thus, serious foreign policy and other consequences relating to U.S. national interests strongly counsel against the adoption of a rule extending civil aiding-and-abetting liability to ATS claims, absent express authorization by Congress.

D. Civil Aiding-And-Abetting Liability Does Not Satisfy *Sosa's* Threshold Requirements.

Under *Sosa*, whatever other considerations are relevant in determining whether an international law norm should be recognized and enforced as part of an ATS federal common law cause of action, a necessary requirement is that the international law principle must, at a minimum, be both sufficiently established and well defined. The Supreme Court did not provide any definitive methodology for assessing when international law norms meet these standards. The Court explained, however, that the principle at issue must be *both* "accepted by the civilized world" and defined with "specificity," and in both respects the norms must be "comparable to the features of the 18th-century paradigms," *Sosa*, 542 U.S. at 725, *i.e* , violation of "safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 720, 724. Thus, in resolving whether the necessary conditions are met, this Court must examine: 1) whether civil aiding-and-abetting liability is broadly, if not universally, accepted by the international community and 2) whether the principle, as accepted by the international community, is defined with "specificity" in each regard to a degree comparable to the "18th-century paradigms."

As we explain below, the common law imposition of civil aiding-and-abetting liability does not meet this test.

1. Plaintiffs argue (pp. 21-22) that it is unnecessary to find an international norm altogether because aiding-and-abetting liability is merely an ancillary rule of decision. But, as we have explained, all of the cautions and admonitions of the *Sosa* Court apply in full to the question of substantive law of whether to adopt aiding-and-abetting liability for ATS claims. Aiding-and-abetting is undoubtedly a separate cause of action and poses the very question raised by the *Sosa* Court, *i.e.*, "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20. It would be directly at odds with *Sosa* for the federal courts to adopt substantive legal principles, as a matter of federal common law, without proof of a universal and specifically defined international norm.

2. There is no such international norm for civil aiding-and-abetting liability. Virtually the only international source even to mention non-criminal aiding-and-abetting liability is a draft article by the International Law Commission. *See* United Nations General Assembly Resolution 56/83 & Annex, art. 16, adopted Jan. 28, 2002. That draft article has no relevance here because it extends liability only to States that aid and abet the wrongful act of another State. *Compare Sosa*, 542 U.S. at 732 & n.20 (court considering whether to recognize cause of action should consider

"whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued").

In order to adjudicate a claim for civil liability based on aiding and abetting an asserted violation of international law, a federal court would be required to confront a host of issues not addressed by international law, including allocation of liability among multiple tortfeasors, the standard of causation, and whether it is appropriate to impose liability on an alleged aider and abettor where the primary tortfeasor is immune from suit. This wholesale law-making is a far cry from the careful and narrow steps envisioned in *Sosa*. The caution mandated by *Sosa*, when coupled with the teaching of *Central Bank* that the decision whether to adopt aiding-and-abetting liability for a civil claim is typically a legislative policy judgment, leads inexorably to the conclusion that a court should not impose aiding-and-abetting liability under Section 1350 absent further Congressional action.

3. Plaintiffs try to remedy this fatal shortcoming by appealing to international practice regarding criminal aiding and abetting. As discussed above, however, there is no "general presumption" that criminal aiding-and-abetting liability extends liability to the civil context. Rather, the general presumption under our domestic law is that such an extension requires an independent legislative policy choice. *Central Bank*, 511 U.S. at 182.

Moreover, the decision to charge a person for an international crime is a grave matter requiring careful exercise of prosecutorial judgment by government officials. That prosecutorial judgment serves as a substantial practical check on the application of the criminal aiding-and-abetting standard. Opening the doors to civil aiding-and-abetting claims in U.S. courts through the ATS could not be more different. Any aggrieved aliens, anywhere in the world, could potentially bring an ATS civil suit in the United States, claiming that a private party aided or abetted abuses committed abroad against them by a foreign government. Such a "vast expansion" of civil liability by adoption of an aiding-and-abetting rule, *Central Bank*, 511 U.S. at 183, is not contemplated in any competent source of international or federal law, criminal or civil.

Under *Sosa*, before creating federal common law aiding-and-abetting liability for civil ATS claims, a court should examine whether there is an international consensus that criminal aiding-and-abetting liability should necessarily translate into a right to sue the aider/abettor for money damages. Given *Central Bank*'s statement that the extension of criminal aiding-and-abetting concepts to the civil context is "at best uncertain," 511 U.S. at 181, it is not possible to draw that conclusion.

4. Even on its own merits, the international criminal norms plaintiffs seek to rely upon do not satisfy *Sosa's* requirements for incorporation into federal common law under the ATS. International criminal aiding and abetting is not one of those

"handful of heinous actions - each of which violates definable, universal and obligatory norms," *Sosa* 542 U.S. at 732 (quoting Edwards, J., in *Tel-Oren, supra* at 781), nor is it at all similar to the historical precedents that *Sosa* teaches should be the measure for supporting causes of action under the ATS. *See* E. Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111, 134, 158 (2004).

Moreover, the standard that plaintiffs propose differs materially from the most recent formulations adopted in international practice. While plaintiffs propose a "knowledge" standard (Br. 25-26), the Rome Statute to which 99 countries are party requires a defendant to act "*for the purpose* of facilitating the commission" of a crime (article 25(3)) (emphasis added). The same standard was adopted by the United Nations Administration for East Timor. *See* 2000 UNATET Reg. No. 2000/15-14.3(1). Thus, plaintiffs' asserted standard fails the second *Sosa* requirement.

Particularly given both the *Sosa* Court's admonitions and the enormous practical consequences of broadening the scope of the ATS if this form of secondary civil liability were added, the district court properly refused to recognize an aiding and abetting claim here.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE CITIZEN PLAINTIFFS' ATS CLAIMS.

Plaintiffs do not dispute the district court's holding that the U.S. citizen plaintiffs cannot properly invoke jurisdiction under the ATS, which is limited to claims asserted by aliens. *See* 28 U.S.C. § 1350. Nonetheless, plaintiffs assert that the U.S. citizen plaintiffs can assert the same federal common law claims based on international law outside of the ATS, under general federal question jurisdiction, 28 U.S.C. § 1331. This Court should reject this invitation to vastly expand the federal common law authority of the courts.

The grant of subject-matter jurisdiction does not ordinarily imply the power to make federal common law. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law"). Although *Sosa* adopted a different rule for ATS cases in light of the distinctive history and context of that statute, footnote 19 of the *Sosa* ruling expressly preserved the traditional rule for other jurisdictional statutes like section 1331. *See Sosa*, 542 U.S. at 731 n.19 ("Our position does not * * * imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350) * * *. Section 1350 was enacted on the congressional understanding that courts

would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption"). Thus, it would be improper to extend that common law authority to adjudicate international law claims brought under Section 1331.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE TVPA DOES NOT PROVIDE FOR AIDING-AND-ABETTING LIABILITY IN THIS CASE.

A prerequisite to liability under the TVPA is that the person sued thereunder have acted "under actual or apparent authority, or color of law, of any foreign nation." Pub. L. 102-256 § 2(a). Liability under this provision is not limited to those committing torture, and is properly read to encompass accessory liability of those who, acting under the color of foreign law, order or facilitate torture. An allegation that a U.S. company sold equipment to a foreign government does not, however, state either a claim of accessory liability or a claim that the U.S. manufacturer acted under foreign law.

Plaintiffs argue, nonetheless, that this Court should both read a claim for aiding-and-abetting liability into the TVPA, and hold defendant liable even though it did not itself act under color of foreign law. Plaintiffs, however, cannot escape the statutory text. As the district court held, recognizing an aiding-and-abetting claim here would be "inconsistent with the TVPA's explicit requirement that a defendant

must have acted under 'color of law.'" ER Doc. 62 at 8. Moreover, as explained above, whether or not to permit a civil aiding-and-abetting claim is a legislative choice. *See Central Bank,* 511 U.S. at 182. Accordingly, absent a clear direction from Congress here, a federal court should not recognize such claims. *Ibid.*

While the Eleventh Circuit has cited support in the legislative history supporting recognition of such liability, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 157 (11th Cir. 2005) (*citing* S. Rep. 102-249 at 8-9 (1991), which states "[t]he legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture," that history is not, by itself, sufficient to satisfy *Central Bank*'s requirement of a clear congressional directive. Moreover, in context, it is evident that the Senate Report did not intend "abetting" liability to obliterate the requirement that the defendant have acted under "actual or apparent authority, or color of law." Rather, all of the examples cited in the Senate Report in which the authors believed liability would attach, although the individual did not perform the act him or herself, concerned a government official "with higher authority who authorized, tolerated or knowingly ignored those acts." S. Rep. 102-249 at 8-9. As noted above, such persons, when acting under color of foreign law, are properly subject to accessory liability under the Act.

More important than the legislative history is the statutory text. As the district court held, recognizing an aiding-and-abetting claim here would be contrary to the

Act's color of foreign law requirement. ER Doc. 62 at 8. That ruling is correct and should be affirmed.

IV. THE DISTRICT COURT CORRECTLY HELD THAT FOREIGN POLICY CONCERNS SUPPORT DISMISSAL OF THE CLAIMS.

A. The *Sosa* Court warned against exercising the common law power in a way that could impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. Here, the district court correctly observed that, for a court "to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government." ER Doc. 62 at 16. As discussed above, the political branches have determined that the United States has a strategic interest in promoting the sale of defense articles to select countries by U.S. manufacturers as part of the FMF program. Permitting this type of suit to proceed would directly challenge the national security determination of the political branches to fund such sales. Such suits would not only deter the sale of military equipment to Israel, but would deter sales to other allied countries, notwithstanding the determination of the political branches to support such sales under the FMF program.

Given that the claims here necessarily implicate the foreign policy of continuing to provide FMF funds to Israel, this is an appropriate case for the exercise of "case-specific deference to the political branches." *See Sosa*, 542 U.S. at 733 &

n.21. That deference reflects the caution demanded by the *Sosa* Court and the recognition that the limited ATS common law authority should not be exercised in a manner that interferes with the exercise of the foreign affairs function by the political branches. *See In re: South African Apartheid Litigation*, 346 F.Supp.2d at 553.

B. For the same reasons, the district court was correct in finding that the claims here present a political question. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court held that claims present a nonjusticiable political question when, *inter alia*, if permitting the claims to go forward would show a "lack of the respect due coordinate branches of government."

The district court correctly found that it would be impossible to adjudicate these claims on their merits without showing a "lack of the respect due coordinate branches of government," which possess the foreign policy prerogatives regarding military funding to foreign nations. Accordingly, the district court properly held that the claims should be deemed nonjusticiable under *Baker*. *See Schneider v Kissinger*, 412 F.3d 190, 194-198 (D.C. Cir. 2005).

C. The district court held that the state law claims failed on their merits no matter which forum's law is applied. Without taking a position on that ruling by the district court, we note that the dismissal of the state law claims is also encompassed within the political question doctrine or foreign affairs deference arguments discussed above. Even beyond those doctrines, the claims should also be dismissed based on

constitutional principles of federal supremacy in matters of foreign affairs. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-425 (2003); *Crosby v. NFTC*, 530 U.S. 363, 384-386 (2000); *Japan Line, Ltd v. County of Los Angeles*, 441 U.S. 434, 447-449 (1979). Those principles preclude a state from imposing liability on the sale of military equipment to a foreign government pursuant to a federal program where such state action interferes with that program.

The state law claims here do *not* charge the sale of a defective product or negligence in the manufacture of the product. Rather, they seek to hold defendant liable for the federally funded sale itself based upon the use of the product by a foreign government. Beyond a doubt, the policing of the propriety of federal funding of sales of military equipment to a foreign country "is hardly 'a field which the States have traditionally occupied,' such as to warrant a presumption against finding federal preemption of a state-law cause of action." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Rather, it is a matter "inherently federal in character." *Ibid.* Indeed, to permit these claims to proceed under state law would be to deter U.S. contractors from selling military equipment under the FMF program. Thus, these state law claims implicate interests that are uniquely federal in nature and the claims are properly deemed preempted by federal law. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-505 (1988).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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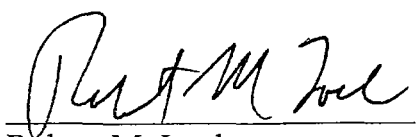
CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,980 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.



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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2006, I served the foregoing "BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE" by causing copies to be sent by Fed Ex delivery (and e-mail to lead counsel where indicated) to the following counsel of record:

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